

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KALEB COLE,

Defendant.

No. CR20-032 JCC

RESPONSE TO GOVERNMENT'S
MOTION IN LIMINE REGARDING
UNDERCOVER OFFICER'S
PSEUDONYM

I. Introduction

Defendant, Kaleb Cole, by undersigned counsel, respectfully submits that the Court should deny the government's motion in limine to permit the undercover officer to testify under a pseudonym. This objection is based on Confrontation Clause of the Sixth Amendment and the following memorandum of law.

II. Background

In preparation for trial, the government submitted a motion in limine requesting the Court allow the undercover officer to testify using a pseudonym at trial. The officer's alleged interactions with Mr. Cole are a significant part of the government's case, as the officer recorded conversations with Mr. Cole. The government's reasons for this request include concerns for the officer's safety and concerns about compromising the officer's current undercover operation.

1 Despite these concerns, allowing the officer to testify using a pseudonym violates Mr. Cole's
2 Sixth Amendment right to confront the witnesses against him.

3 **III. Argument**

4 The Confrontation Clause of the Sixth Amendment guarantees a defendant facing criminal
5 charges the fundamental right to cross-examine adverse witnesses. Smith v. Illinois, 390 U.S.
6 129, 133 (1968). One of the policies underlying the Confrontation Clause is the defendant's
7 opportunity to "put the weight of his testimony and his credibility to a test." Id. at 132. To
8 determine whether a court may withhold a witness's name, a court balances the defendant's right
9 to confront witnesses against the government's interest in not compromising investigations and
10 in protecting the witness's identity. United States v. Gil, 58 F.3d 1414, 1421 (9th Cir. 1995). The
11 balancing test involves three factors: (1) the degree to which the witness was involved in the
12 activity; (2) how helpful the witness's testimony would be to the defendant; and (3) the
13 government's interest in non-disclosure. Id.

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15 To adequately assess the credibility of a witness, a defendant must be able to ask witnesses
16 who they are. The Supreme Court addressed this in Smith v. Illinois, where the prosecution's star
17 witness against a defendant in a drug case was a man who testified using a pseudonym. 390 U.S.
18 at 130-31. The court held that the defendant had the right to ask the witness his true name because
19 "when the credibility of a witness is an issue, the very starting point in 'exposing falsehood and
20 bringing out the truth' through cross-examination must necessarily be to ask the witness who he
21 is." Id. at 131 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

22 While courts have held that a trial judge has significant discretion in the determining the
23 scope of cross-examination, a Court cannot completely limit examination of a witness's
24 credibility. Id. When the government believes there is a concern for a witness's safety, the
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1 government bears the burden of demonstrating that “the threat to the witness [is] actual and not a
2 result of conjecture.” United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969).

3 The government has not met its burden of showing that the threat to the officer is “actual”
4 rather than “conjecture.” In support of its motion in limine, the government provides screenshots
5 of messages from a person expressing interest in the undercover officer’s identity. While the
6 government contends that this is concerning because the poster has been identified as a neo-Nazi
7 extremist, the poster does not make any threats towards the officer in these messages. The
8 individual makes no suggestions that he or anyone else intend violence or harassment towards the
9 officer. Thus, the screenshots provided do not show an “actual” threat.

10 Although the government expresses additional concern about the individual’s wanting to
11 know the officer’s identity because “Atomwaffen members have been linked to multiple acts of
12 violence,” it has made no showing that the particular individual expressing interest in the officer’s
13 identity is violent. Nor has the government presented evidence even suggesting the poster of these
14 messages is connected in any way to Mr. Cole or Atomwaffen. Even if the poster were connected
15 to Atomwaffen, simple membership in a group where a few members have committed violent
16 acts does not automatically lead to the conclusion that each member of the group is violent.
17 Furthermore, the government’s suggestion that this individual’s interest in the officer’s identity
18 is a “continuation” of the course of conduct Mr. Cole is accused of is unsupported. Beyond
19 attempting to obtain the identity of the officer, the government provides no evidence showing that
20 the poster or others associated with the poster threatened or will threaten the officer if his identity
21 is discovered. And, of course, threatening an FBI agent would not represent a continuation of the
22 conduct alleged in this case; it would be a different matter entirely. Thus, the government’s
23 contention is pure speculation and they have not met their burden of showing actual threat.
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1 The government also contends that identification of the officer will compromise the officer's
 2 current and future investigations. While the defense acknowledges this concern, Mr. Cole's right
 3 to confront the witnesses against him outweighs this concern. Although the identity of the officer
 4 may not impact the substance of the questioning, it will impact Mr. Cole's ability to cross-
 5 examine the officer about his credibility. Smith, 390 U.S. at 130. Adequate assessment of the
 6 officer's credibility includes the ability to ask the officer's identity and background. Such
 7 questions will allow the jury to assess the credibility and weight of the officer's testimony.
 8 Considering the likely importance of the officer's testimony in this case, Mr. Cole's right to
 9 confrontation requires he be able to question the officer about his identity and background.

10 **IV. Conclusion**

11 For the foregoing reasons, the defense respectfully requests that the Court deny the
 12 government's motion in limine to permit the undercover officer to testify using a pseudonym.

13 Respectfully submitted this 21st day of September, 2021.

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